No. 83-2001

In the Supreme Court of the United States

October Term, 1983

GWELDON LEE PASCHALL AND INTERVENORS,
Petitioners,

VS.

THE KANSAS CITY STAR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

SHERIDAN MORGAN (*Counsel of Record*)
HARRY A. MORRIS
DONALD H. LOUDON
MORRIS, LARSON, KING, STAMPER
& BOLD
Two Crown Center, Suite 400
2420 Pershing Road
Kansas City, Missouri 64108
(816) 421-6767
Attorneys for Petitioners

Of Counsel:
BENJAMIN W. HEINEMAN, JR.
WILLIAM P. O'NEILL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule

Other Authorities

No. 83-2001

In the Supreme Court of the United States

October Term, 1983

GWELDON LEE PASCHALL AND INTERVENORS,
Petitioners,

VS.

THE KANSAS CITY STAR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTRODUCTORY STATEMENT

Respondent utterly fails to address the fundamental issue presented by the *en banc* opinion and the Petition for Certiorari—whether it is presumptively lawful for a manufacturer to extend its monopoly by refusing to deal with all of its distributors and concomitantly integrate forward into the retail market with proven anticompetitive effects. Both the Sixth Circuit in a case relied upon by Respondent, and more recently the Tenth Circuit, characterize such refusals to deal by monopolists as "one of the most unsettled and vexatious legal issues of antitrust law."[1] Both courts of appeal were, in effect, inviting this Court to review the issue which this case unambiguously presents.

---

1. *Byars v. Bluff City News Co.*, 609 F.2d 843, 846 (6th Cir. 1980); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 1984-2 Trade Cases (CCH) Par. 66,101 at p. 66,138 (10th Cir. July 13, 1984).

Respondent cannot escape from its previous assertions that this case squarely presents "issues of exceptional public importance" (Respondent's Petition for Rehearing *En Banc,* p. 2), or that the United States in a rare *amicus* appearance stated that the case involves "an important question of antitrust law which has not been authoritatively resolved by the Supreme Court." (Motion of the United States as *Amicus Curiae,* p. 1).[2]

The Court of Appeals for the Eighth Circuit failed to request a response from Petitioners before granting the rehearing *en banc* and the United States, before filing an original *amicus* brief herein and thereafter, failed to consult with Petitioners about the merits of the case. Despite an announced policy to consult all sides before entering a case as *amicus,* the United States relied on Respondent to supply some miscellaneous papers—mainly those filed on behalf of Plaintiffs—and was told that "although these papers are obviously incomplete, . . . they will afford you the security that you have reviewed all of Plaintiffs' arguments in deciding whether there are any obscured pitfalls to the position we hope you will be able to support." Letter 9/30/81 from Daniel K. Mayers of Wilmer, Cutler & Pickering, attorneys for Respondent, to Stephen Ross, U. S. Department of Justice.

Respondent tries to dismiss the justification for the United States' appearance on its behalf by claiming that the district court's and the original panel's decision was a

---

2. In addition to the appearance of the United States as *Amicus Curiae* supporting Respondent's Petition for Rehearing En Banc, additional *amicus* briefs were filed by the International Circulation Managers, Inc. and the American Newspaper Publishers Association. Petitioners were not requested to reply as contemplated by Rule 40 of the Rules of Appellate Procedure and, therefore, Petitioners did not have the opportunity to respond in writing to the various briefs in support of or the petition for rehearing.

"serious departure from accepted law and antitrust policy." (Respondent's Brief in Opposition, hereinafter "Resp. Br.", p. 4). This is a flat misstatement of the United States' position that a refusal to deal by a monopolist raises "an important question" that this Court has not "authoritatively resolved."[3] This misstatement, and other misstatements by Respondent shown herein, are merely part of a standard tactic to diminish the importance of this case. This Court should grant Certiorari to answer the basic and unresolved issue that the instant case presents.

I.

RESPONDENT FAILS TO SHOW WHY THIS COURT SHOULD NOT REVIEW THE NOVEL PRESUMPTION OF LEGALITY FOR A MONOPOLIST'S BEHAVIOR ADOPTED BY THE EN BANC MAJORITY.

A. Respondent attempts to characterize this case as "merely one more of a long line of cases" involving newspaper publishers entering into retail markets. (Resp. Br., p. 5). No case cited by Respondent, save the *Byars* opinion by the Sixth Circuit, raised the fundamental antitrust issue presented here.[4]

---

3. It is to be noted that the United States, although served with a copy of the Petition for Certiorari, has not yet chosen to oppose Petitioners' position that this case presents an issue that should be "authoritatively resolved by the Supreme Court." Compare *Lewis Service Center, Inc.*, Dkt. 83-1273.

4. In *Byars v. Bluff City News Co., supra*, the court of appeals *remanded* to the trial court for factual findings as to whether the publisher's forward integration into retail distribution involved exercise of monopoly power together with a refusal to deal with the principal distributor which would cause anticompetitive effects. 609 F.2d at 864. On remand, the district court did not find any anticompetitive effects and the Sixth Circuit subsequently affirmed, noting that "there is little doubt that this court may well have come to a different conclusion had we viewed *de novo* the evidence on the present record." *Byars v. Bluff City News Co.*, 683 F.2d 981, 983 (6th Cir. 1982).

The only common thread of Respondent's cases is that they arose in the newspaper industry but each addressed antitrust issues distinctly unrelated here, such as resale price maintenance (*Albrecht, Newberry*), unilateral termination of a single or only a few distributors (*Knutson, White, Grill*), territorial restraints (*Newberry*) or standards for a preliminary injunction (*Auburn, Hardin*). The *Auburn* case which Respondent points out (Resp. Br. p. 8) as directly on point had no competition to distributors at the separate retail market level. Moreover, many of those cases did not involve a monopolist (*White, Knutson, Neugebauer, McGuire*) or proof and findings of anticompetitive effects (*Naify, Hardin*).[5]

The *en banc* holding has no relation to Respondent's cases and goes substantially beyond the newspaper industry because of its presumption of legality sanctioning a monopoly manufacturer willfully extending its monopoly into the retail market by refusing to deal with all existing

---

5. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Newberry v. Washington Post Co.*, 438 F. Supp. 470 (D.D.C. 1977); *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1970); *White v. Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982); *Grill v. Reno Newspapers, Inc.*, 6 Media L. Rep. (BNA) 1818 (D. Nev. 1980); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Hardin v. Houston Chronicle Publishing Co.*, 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd mem.*, 572 F.2d 1106 (5th Cir. 1978); *Neugebauer v. A.S. Abell Co.*, 474 F. Supp. 1053 (D. Md. 1979); *McGuire v. Times Mirror Co.*, 405 F. Supp. 57 (C.D. Cal. 1975); *Naify v. McClatchy Newspapers*, 599 F.2d 335 (9th Cir. 1979).

The 3-judge panel majority, after a thorough analysis, found them not inconsistent with the district court's finding that Respondent's forward integration and refusal to deal with monopoly power would cause anticompetitive effects in the instant case. (Pet. App. A49-51). The trial court examining the so-called "newspaper cases" cited by Respondent in the context of the undisputed evidence found that same were "inapposite" and that the "factual setting or rationale" was inapplicable here. (Pet. App. A99).

independent retail businesses. The *en banc* majority *did not rely on those cases to reach its novel presumption* because none of them other than *Byars* presented the issue raised here; the court of appeals referenced them only at the end of its *en banc* opinion.

B. Respondent tries to diffuse the fundamental presumption adopted by the *en banc* majority by claiming that this Court has long held that vertical integration was presumptively lawful. (Resp. Br., p. 10).

But this case involves extension of monopoly power to begat monopoly not merely vertical integration by firms in competitive markets (*Paramount Pictures, Columbia Steel, Berkey*);[6] it presents the case of a monopolist manufacturer, whose monopoly was illegally attained, now seeking to extend that monopoly by the use of its monopoly power into a competitive retail market by refusing to deal with hundreds of long established, independent retail businesses, acquiring thereby their customers and destroying in the process all existing competition. If a monopolist is permitted to act in this manner under the guise of "vertical integration" into heretofore competitive markets, is there anything left of this Court's rulings in *Griffith—Paramount Pictures—Columbia Steel* and *Southern Photo-Otter Tail*[7] that would presume such conduct unlawful?

Moreover, Respondent fails to acknowledge that the district court found proof of anticompetitive effects by its

---

6. *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

7. *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Paramount Pictures, supra; United States v. Columbia Steel Co., supra; Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

forward integration and refusal to deal (higher prices, lower services on many routes and lack of efficiencies), leaving only the novel presumption of lawfulness as the basis for the *en banc* ruling. Indeed, in its factual summary, Respondent misstates the *en banc* majority's reasoning and fails to quote from any of the courts' opinions as to the facts of this case, because the factual findings of anticompetitive effects—which the *en banc* majority concedes (Pet. App. A18-A20)—are flatly inconsistent with its theory of the case.[8]

C. Respondent misstates the Petition for Certiorari when it asserts that Petitioners have not claimed that the *en banc* opinion conflicts with holding of the other circuit courts of appeals. (Resp. Br., pp. 8-9).

Petitioners unequivocally claim that the *en banc* holding directly conflicts with decision of both this Court and the other circuits. (Petition for Certiorari, p. 18).

The *en banc* opinion clearly went much further than any court has in sanctioning monopoly behavior. No court has ever established a presumption of lawfulness for monopoly conduct that causes proven anticompetitive effects. *Cf. Griffith, supra* at pp. 107-108.

---

8. Respondent misstates the relevance of the district court's finding that it acted with a legitimate business purpose. (Resp. Br., p. 6). As Petitioner's brief and this Court's decisions have made clear, a legitimate purpose may go to evidence of lack of specific intent, but proof of anticompetitive effects caused by a monopoly firm is all that is necessary to show general intent to monopolize and a violation of Section 2 of the Sherman Act. The intent element of a monopolization offense may be met by a showing of either unlawful purpose or anticompetitive effects from the exercise of monopoly power. *Griffith*, Petition for Certiorari, p. 15; see also *en banc* opinion, App. A6.

II.

RESPONDENT IGNORES THE CAPRICIOUS AND DANGEROUS APPROACH USED BY THE EN BANC MAJORITY IN FASHIONING A NOVEL PRESUMPTION OF LAW BASED ON AN ECONOMIC THEORY NEVER RAISED AT TRIAL AND CONTRADICTED BY THE EVIDENCE.

Respondent terms this case as presenting an "everyday issue" of burden of proof (Resp. Br., p. 14) and that the *en banc* majority's reasoning was "very simple and very ordinary" (Resp. Br., p. 17).

Yet the *en banc* majority reversed the district court by relying on an economic theory not raised at trial, not tested by the district court on the facts of the case, and, contrary to Respondent's claims, highly controversial.[9] Indeed, Respondent *never* claims that it and the *en banc* majority's economic theory of the case was raised at trial.

The *en banc* majority and Respondent (Resp. Br., p. 18) both relied on an argument of the nature of a newspaper's revenues. Respondent raised this theory for the first time on appeal. Indeed, the undisputed trial evidence presented showed that Respondent, upon extending its monopoly into the competitive retail market, conceded it planned to raise retail prices and reduce the range of services to retail customers without increasing efficiency or output at the retail level. A result that could not have been reached if Petitioners had enjoyed "natural monopolies" as now claimed by the Respondent (Resp. Br.,

---

9. American Bar Association, Section of Antitrust Law, Monograph No. 9, *Refusals to Deal and Exclusive Distributorships*, Chapter V ("Should There Be A Different Rule for Refusals to Sell By Monopolists?") at pp. 35-44 (1983); P. Areeda, ANTITRUST ANALYSIS par. 218 (3d ed. 1981); Sullivan, ANTITRUST, pp. 128-129 (1977).

p. 1) before the threatened termination of Petitioners. Further, this Court, as recently as June 27, 1984, in *National Collegiate Athletic Association v. Board of Regents of The University of Oklahoma, et al.*, stated that "a restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with . . . antitrust law."

As this Court held in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-689 (1978), any exception of a particular industry from application of the antitrust law should be addressed to Congress, not the courts.

The *en banc* majority termed its holding as one of burden of proof precisely because of its novel presumption—that Petitioners did not offer enough evidence to rebut a new presumption raised and embraced for the first time on appeal. Evidentiary presumptions such as the novel presumption adopted here clearly go to the level of burden of proof that a party must meet.[10] The *en banc* majority holding illustrates the folly of an appellate court applying neo-economic theory not tested at the trial level and in conflict with undisputed findings of fact.

Finally, Respondent cites no cases in which any court has embraced the theory of "optimum monopoly pricing" as a rule of law. This Court should address how the appellate courts should handle novel economic theories—either as one of many tools for analysis of the facts or as substantive presumptions.

In sum, the *en banc* majority's approach—which Respondent would have this Court believe was only "common

---

10. Contrast with the approach by the Sixth Circuit in *Byars v. Bluff City News Co., supra*, detailed in Footnote 4 herein.

sense" (Resp. Br., p. 17)—is unsound as a matter of legal reasoning and fundamentally unfair to Petitioners. Theories need to be tested by trial courts in the factual circumstances of real cases, and against competing theories, before becoming presumptions of law.

CONCLUSION

For the foregoing reasons and all those cited in the Petition for Certiorari, this Court should issue the Writ of Certiorari.

Respectfully submitted,

SHERIDAN MORGAN (*Counsel of Record*)
HARRY A. MORRIS
DONALD H. LOUDON
MORRIS, LARSON, KING, STAMPER & BOLD
Two Crown Center, Suite 400
2420 Pershing Road
Kansas City, Missouri 64108
(816) 421-6767
Attorneys for Petitioners

Of Counsel:

BENJAMIN W. HEINEMAN, JR.
WILLIAM P. O'NEILL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006